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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1937

No. 362

THE CENTURY INDEMNITY COMPANY
(a corporation),
Petitioner,

vs.

G. NELSON,
Respondent.

REPLY BRIEF FOR RESPONDENT.

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Subject Index

		Page
Preliminary Statement		1
I.	History of case	2
II.	Respondent's statement of case	2
III.	Summary of argument	16
IV.	First error specified	18
	First. The bill of exceptions fails to preserve this point	19
	Second. Petitioner's own conduct has been contrary to its contention	21
	Third. "Progress of the trial" had ended before petitioner proposed any special findings	22
V.	Second error specified	36
	(a) Circuit Court of Appeals did pass on the merits	36
	(b) Unassigned "plain error" will only be noticed where failure to do so will be "so clearly prejudicial as to result in injustice"	38
	(c) The trial court followed the "law of the case" as established on the first appeal	39
	(d) The Supreme Court of California has decided against petitioner the main question in this case	39
	(e) The binding effect of the findings in Berges v. Abraham was decided on the first appeal and has became the law of the case	41
	(f) Additional reasons why petitioner is bound by the findings in Berges v. Abraham	43
VI.	Judgment is supported by findings and conclusions	52

Table of Authorities Cited

Cases	Pages
Alexander v. Machan, 147 U. S. 72	33
Armstrong v. Metropolitan Life Ins. Co. (CCA 8), 85 F. (2d) 185	27
Atlantic & N. C. R. Co. v. Atlantic & N. C. Co. (N. C.), 23 L. R. A. (N. S.) 223 at 231	52
Babbitt Bros. Trading Co. v. New Home Sewing Machine Co. (CCA 9), 62 F. (2d) 530, 536	27
Beach v. Waite, 21 Cal. App. 304	40
Bender v. George, 92 Pa. St. 36	56
Braun v. Crew, 183 Cal. 728	40
Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811	38
Century Furniture Co. v. Bernhard's Inc. (CCA 9), 82 F. (2d) 706	33
Century Indemnity Co. v. Nelson (CCA 9), 65 Fed. (2d) 765	2, 8, 27
Century Indemnity Co. v. Nelson, Oct. Term 1933, No. 456, 290 U. S. 683, 78 L. Ed. 588	2
Columbia Nat. Life Ins. Co. v. Griffith (CCA 8), 73 F. (2d) 244, 248	27
Continental National Bank v. National City Bank, etc. (CCA 9), 69 F. (2d) 312	27
Continental National Bank v. National City Bank of New York, 293 U. S. 557	29
Corvallis etc. Co. v. Portland etc. Co. (Oregon), 163 Pac. 1173 at 1178-1179	52
Cutting Packing Co. v. Packers' Exch., 86 Cal. 574, 25 P. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63	52
Davis v. Heimbach, 75 Cal. 261, 17 P. 199	55
Davis v. United States, 67 Fed. (2d) 737 (CCA 10)	20
Denver Live Stock Com. Co. v. Lee (CCA 8), 18 F. (2d) 11, 16	32
Easton v. Boston Investment Co., 51 Cal. App. 246 at 251-252	51
Federal Intermediate Credit Bank of Omaha v. L'Herisson (CCA 8), 33 F. (2d) 841	32

Pages

Fidelity & Deposit Co. of Maryland v. U. S. ex rel. Woods (CCA 9), 72 F. (2d) 828 33
First Nat. Bank of San Rafael v. Philippine Corp. (CCA 9), 51 F. (2d) 218 27
Fleischmann C. Co. v. U. S., 270 U. S. 349, 70 L. Ed. 624 35

Greenway v. United Saes, 67 Fed. (2d) 738 (CCA 10) 20

Harding v. Minear, 54 Cal. 502 at 507 57
Harvey Co. v. Malley, 288 U. S. 415, 418, 77 L. Ed. 866, 867 30
Huron College v. Union County Trust Co. (CCA 8), 77 F. (2d) 609 ..... 27, 33

Imperial Refining Co. v. Kanotex Refinery Co. (CCA), 29 F. (2d) 193, 199 52
Inland Irving Nat. Bank of Chicago v. American Flange and Mfg. Co. (CCA 7), 75 F. (2d) 533 27
Irwin v. Backus, 25 Cal. 214 at 223 51

Kansas Society Life Ins. Co. v. Shirk et al. (CCA 10), 50 F. (2d) 1046 32
Key v. Oates (Tex.), 280 S. W. 286 51
Kolton v. United States, 67 Fed. (2d) 741 (CCA 10) 21

Lando v. Equitable Life Ass. Society of U. S. (CCA 9), 84 F. (2d) 640 ..... 27, 33
Lyle v. Phillips Petroleum Co. (CCA 8), 72 F. (2d) 347 ... 32

Mahler v. Eby, 264 U. S. 32 (68 L. Ed. 549 at 557 38
McLaughlin v. Pac. Lumber Co., 293 U. S. 351, 55 S. Ct. 219, 79 L. Ed. 423 33
Mercantile Trust Co. v. Wood, 60 Fed. 346 ..... 33, 34
Mittry Bros. Const. Co. et al. v. U. S. etc. (CCA 9), 75 F. (2d) 79 33
Modoc County Bank v. Ringling (CCA 9), 7 F. (2d) 535, 536 32
Morgan, In re (CCA 6), 26 F. (2d) 183 38
Mutual Life Ins. Co. v. Parkinson (CCA 6), 72 F. (2d) 759 38

Pico v. Wehater, 14 Cal. 202 at 204 51
Riddle v. Baker, 13 Cal. 295 51

Sanders v. Magill, 94 Cal. Dec., page 34 39
Sanfeliz v. Bank of Nova Scotia (CCA 1), 74 F. (2d) 338 .. 27
Seaboard Surety Co. v. U. S., 84 F. (2d) 348 26

Pages

Thompson-Starrett Co. v. La Belle Iron Works, 17 Fed. (2d) 536 34
Tompkins v. Powers, 106 Cal. App. 464, 466..... 40

U. S. v. Martin, etc. (CCA 10), 80 F. (2d) 460..... 33
U. S. F. & G. Co. v. Board of Commissioners, 145 Fed. 144 34
U. S. F. & G. Co. v. Yielding Bros. etc., 143 So. 176 at 181-183 56

Vincent v. Garland, 86 Cal. App. Dec. 5..... 40

Williams v. Naftziger, 103 Cal. 438, 440..... 40

Codes

Civil Code, Section 2848 57
Civil Code, Section 2849 60

28 U. S. C. A. Title 28, Section 875 .....19, 20

Texts

Arant on Suretyship, page 11 53
Arnold on Suretyship & Guaranty, page 266 53

California Jurisprudence, Vol. 18, page 57, Par. 375 52
California Jurisprudence, Vol. 23, pages 1062-1063..... 51
Corpus Juris, Vol. 50, page 26, Par. 34..... 52
Corpus Juris, Vol. 50, page 196, Section 336..... 51
Corpus Juris, Vol. 50, page 278 52
Corpus Juris, Vol. 50, page 279 and note 99 52
Corpus Juris, Vol. 50, page 313, Par. 529 52
Corpus Juris, Vol. 50, page 314, Section 531 59

Manual of Federal Appellate Procedure (1937—Cumulative Supplement, pages 9 and 10 26

Rowley—Modern Law of Partnership, Vol. I, page 707, Section 558 52

Stearns on Suretyship, Section 263, page 477 (3rd Ed.).... 53

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REPLY BRIEF FOR RESPONDENT.

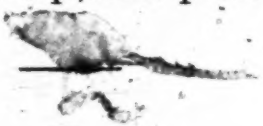
PRELIMINARY STATEMENT.

The expense to date in the several trials and appeals in this case has already become so large in relation to the amount involved that it is not possible to send counsel to Washington or employ counsel there to argue this case orally, as should be done. For this reason we have found that this written presentation of our case must needs be more explicit, and hence longer, than otherwise it should be.

I.

HISTORY OF CASE.

This case has been tried and appealed twice and now is before this court for the second time on petition for writ of certiorari. On the first trial judgment went to defendant, the present petitioner. The Circuit Court of Appeals reversed this judgment with directions. (65 Fed. (2d) 765.) The defendant petitioned this court for a writ of certiorari. The petition was denied. (*Century Indemnity Co. v. Nelson,* Oct. Term, 1933, No. 456, 290 U. S. 683, 78 L. Ed. 588.) On retrial judgment went for plaintiff, respondent here. Petitioner appealed and the judgment was affirmed. (90 Fed. (2d) 644.) Thence the case is here again in the present proceeding.



II.

RESPONDENT'S STATEMENT OF THE CASE.

Petitioner's statement of the case is so very incomplete that it fails to give the court a correct view of the issues, the points decided, and the meaning of the last decision by the Circuit Court of Appeals. We therefore restate the case.

One Berges, as assignee of Goodyear Redwood Lumber Co., brought an action against N. Abraham, H. Silberman and L. Silberman individually and as co-partners doing business under the name of N. Abraham Mercantile Company, and against San Francisco Iron & Metal Company. (R. 36.) Writs of attachment were issued and property, credits and

effects of each of these defendants "in excess of the value of $6000.00 for each of said defendants" were attached. (R. 36.) Abraham gave a bond of Fidelity and Casualty Company of New York in release of the attachment on his "property, credits and effects" (R. 47-48) and the Silbermans and San Francisco Iron & Metal Company jointly gave the bond of petitioner, Century Indemnity Company, in release of the attachment on their respective properties, credits and effects. (R. 36-39.) These last defendants and the Century Indemnity Company then stipulated with the plaintiff Berges:

> "That for the purposes of said bond the plaintiff has, before February 14, 1929, attached property, credits and effects of each of said four defendants of the then value of $6000.00 each." (R. 40-41.)

The importance of this stipulation will appear a little later.

The pleadings, findings and judgment in *Berges v. Abraham, et al.,* are very important.

These documents were introduced into evidence and appear at pages 58-93 of the record. Four causes of action were stated in the original complaint. An important paragraph on which we rely was not in the original complaint. This paragraph was added later as an amendment to all four causes of action. (R. 66.) It was made paragraph IV-a of the first cause of action, II-a of the second, II-a of the third, and II-a of the fourth. The answer of the Silbermans and San Francisco Iron & Metal Company de-

nied this particular paragraph in each instance. (R. 69-71.) (See last paragraph in each numbered paragraph of the answer I to IV inclusive.) So this allegation was one of the issues in the case. Hence the court in that case was not only justified in making a finding on this issue but was required to make a finding on it. That finding was (R. 84-85):

> "That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, *agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham,* L. Silberman and San Francisco Iron & Metal Company, a corporation, *individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company;* that prior to the commencement of this action, defendant San Francisco Iron & Metal Company, a corporation, *received all or practically all of the property and assets of the N. Abraham Mercantile Company and of N. Abraham, L. Silberman* and San Francisco Iron & Metal Company, a corporation, individually *and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company,* and in consideration thereof and other valuable considerations, *specially promised and agreed to apply said property and assets to the payment of the said indebtedness to the said Goodyear Redwood Lumber Company,* but that said defendant San Francisco Iron & Metal Company has wholly failed to do so."

The trial court in *Berges v. Abraham, et al.*, made separate fiindings for each of the four counts in the

complaint; and this finding is incorporated in every one of them. (R. 84, 87, 88 and 89.)

The judgment then says (R. 91):

> "This cause coming on regularly to be heard and after the evidence was introduced and argument had by counsel for the respective parties the court made and filed its findings of fact and conclusions of law."

The judgment then proceeds:

> "*Pursuant thereto*"—that is, pursuant to such *findings of fact* and conclusions of law—"it is hereby ordered adjudged and decreed" (R. 91-92):
>
> "1. That plaintiff, V. Berges, do have and recover from the defendants, N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, *individually and as joint adventurers and as co-partners* doing business under the name of N. Abraham Mercantile Company, the sum of Five Thousand Six Hundred Forty-three and 65/100 ($5,643.65) Dollars, together with her costs of action taxed at $112.40."

So the judgment was based on the findings as drawn and approved.

Therefore, in *Berges v. Abraham, et al., first,* the plaintiff, Berges, as ground for recovery against *all* defendants, relied upon the allegation that San Francisco Iron & Metal Company had assumed the obligation of the other defendants to the plaintiff's assignor and had received certain assets and had agreed to apply such assets in settlement of the obligation and, *second,* Berges' allegation to such effect

was denied and, *third,* the court found Berges' allegation true and, *fourth,* the court rendered judgment in Berges' favor against the defendants *on that basis. Thereby the court tried out and decided what were the mutual relations between the defendants in respect of the claim of Berges' assignor.*

When judgment in the *Berges* case became final respondent Nelson, using funds supplied by Fidelity and Casualty Company of New York, purchased the judgment and Berges assigned the judgment to Nelson who holds it in trust. The judgment has never been paid. (R. 42.)

Meanwhile San Francisco Iron & Metal Company went into bankruptcy. Nelson filed a claim in the bankruptcy proceedings for payment of the judgment. The bankruptcy matter is still pending. No payment on the claim has been made. (R. 43.) On the trial below Nelson tendered to Century Indemnity Co., and delivered to the clerk of the trial court for petitioner's benefit and use upon payment of the judgment in this case, an assignment of this claim against the bankrupt's estate. (R. 48.)

As Century Indemnity Co. refused to pay the judgment, so assigned to Nelson, this action was brought on the bond on release of attachment which Century Indemnity Co. had given on behalf of Silbermans and San Francisco Iron & Metal Company. Nelson seeks to recover the full amount.

This claim for the full amount of the judgment (principal, costs and accumulating interest), is founded upon the proposition that, as among Abra-

ham, the Silbermans and San Francisco Iron & Metal Co., the *latter* had assumed and agreed to pay their obligation to Goodyear Redwood Lumber Co., the assignor of Berges, and had received practically all the assets of the four defendants as co-adventurers and in consideration therefor had obligated itself to apply these assets to liquidation of their obligation, and that in consequence Abraham, and therefore Abraham's surety on his bond in release of attachment, namely, Fidelity & Casualty Company of New York, should be fully protected against the judgment. Therefore Abraham's surety could purchase the judgment and, as assignee thereof and hence a judgment creditor, could sue on the bond in release of attachment which Century Indemnity Co. had executed on behalf of *San Francisco Iron & Metal Co.*

On the first trial the *entire* judgment roll in *Berges v. Abraham, et al.* was introduced into evidence over defendant's objection. (R. 45 on petition to this court for writ of certiorari on reversal of judgment on first appeal—Oct. Term 1933 No. 456.) However, the bill of exceptions on that appeal only included the findings, conclusions of law and judgment. The pleadings (which, however, are in the record on the second appeal) were omitted. (Pages 45-57 in said No. 456.)

So the record on that appeal included *verbatim* the finding in the *Berges* case which we have quoted in full at page 4 of this brief. (R. 49, Oct. Term 1933, No. 456, supra.)

On the first appeal the Circuit Court of Appeals, after reviewing the case, laid down these principles

for the solution of the controversy (65 Fed. (2d) 765 at 768):

(1) "According to the findings of fact in the Superior Court action the corporation, San Francisco Iron & Metal Company, which is alleged to be one of the copartners, together with L. Silberman, H. Silberman, and N. Abraham, acting under the firm name of N. Abraham Mercantile Company, was originally jointly liable for the indebtedness sued upon. N. Abraham Mercantile Company, the copartnership, transferred all the property of the copartnership to the corporation in consideration of an agreement on the part of the corporation to pay all the debts of the former partnership. This agreement would constitute the corporation a principal and the members of the copartnership and the copartnership sureties. Davis v. Heimbach, 75 Cal. 261, 17 P. 199; Cutting Packing Co. v. Packers' Exch., 86 Cal. 574, 25 P. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63; Imperial Refining Co. v. Kanotex Refinery Co. (C. C. A.), 29 F. (2d) 193, 199. *If, therefore, the property seized by the sheriff was the property of the corporation, justice would require that this property be first subjected to the payment of the judgment for which the corporation was primarily liable before the property of N. Abraham, one of the partners for which appellant is surety, or of the other partners, is applied to the judgment, although the corporation is only a co-judgment debtor upon the face of the judgment.*"

* * * * * * *

(2) "*If it should appear from the evidence upon a new trial that there was sufficient property of the San Francisco Iron & Metal Company seized by the sheriff to satisfy the judgment,* then

the appellant surety, representing the rights of a joint debtor who was in law a surety on the obligation of that corporation, *would be entitled to enforce the entire judgment* against the property of the corporation and therefore against the bond issued to release the property of the corporation."

* * * * * * *

(3) "If, on the other hand, the property of the corporation thus released is insufficient to pay the judgment, the plaintiff would be entitled to have the value thereof first applied to the judgment and as to any balance thereon to have one-half of the remainder thereof paid by L. Silberman and the enforcement of the payment of that portion of the judgment against the undertaking of the appellee executed on his behalf."

Then the court said:

"The judgment, however, must be reversed, and the case remanded for further proceedings not inconsistent therewith."

As stated, petition to this court for a writ of certiorari was denied and the case went back to the District Court for a second trial.

Now the complaint alleges that in the *Berges* case a "writ of attachment was issued and levied against the property, credits and effects of the defendants San Francisco Iron & Metal Company, a corporation, and L. Silberman" and that thereafter "certain property, credits and effects of *each* of said defendants in excess of the value of $6000.00 were attached". (R. 2.) The answer denies this allegation. (R. 12.) But

the complaint further alleges the making of the stipulation between Berges, the Silbermans & San Francisco Iron & Metal Co. and Century Indemnity Co.

> "That for the purpose of said bond the plaintiff has before February 14, 1929 attached property, credits and effects of *each* of said four defendants of the then value of $6000.00 *each.*" (R. 6.)

Please note the effect of the word "each" at the end of this stipulation. Century Indemnity Co. admits the execution of this stipulation. (Answer, R. 12.) The trial court on the retrial therefore found (R. 36):

> "* * * that thereupon in said action a writ of attachment was issued and levied against the property, credits and effects of the defendants San Francisco Iron & Metal Company, a corporation, H. Silberman, and L. Silberman, as security for the satisfaction of any judgment that might be recovered by plaintiff V. Berges; and certain property, credits and effects of *each* of said defendants in excess of the value of $6,000.00 for *each* of said defendants were attached and seized by the Sheriff of the said City and County of San Francisco pursuant to said Writ of Attachment."

Thereby the plaintiff (Nelson) had complied with the rule laid down in this case by the Circuit Court of Appeals that:

> *"If it should appear from the evidence upon a new trial that there was sufficient property of the San Francisco Iron & Metal Company seized by the sheriff to satisfy the judgment,* then the appellant surety, representing the rights of a

> joint debtor who was in law a surety on the obligation of that corporation, *would be entitled to enforce the entire judgment against the property of the corporation and therefore against the bond issued to release the property of the corporation.*"

So judgment necessarily went for plaintiff against defendant.

On the second trial the complete judgment roll (pleadings, findings, conclusions of law and judgment) in *Berges v. Abraham, et al.*, were again introduced in evidence over defendant's objection. (R. 53-93.)

On the second trial, in an attempt to overcome the finding in *Berges v. Abraham, et al.* that San Francisco Iron & Metal Company had assumed the payment of the claim of Berges' assignor, the defendant introduced the testimony of one of the Silbermans. (R. 119-130.) But the testimony of this witness really destroys petitioner's case.

Silberman testified, as questioned by petitioner (R. 129):

> "Q. If I understand your testimony correctly a few minutes ago you said *in the dissolution of your partnership that the San Francisco Iron & Metal Company agreed to pay the obligations of the partnership, is that correct?*
>
> A. *I did.*"

Thereby Silberman proved one of the main points in the crucial finding in *Berges v. Abraham, et al.*

Silberman went further. He said (R. 122):

"The partnership assumed all the indebtedness when it was merged with the corporation."

In other words, at the time when the corporation assumed all the debts of the partnership (his testimony, supra) the partnership was merged in the corporation. That meant just one thing, namely: *that the corporation took over all the assets of this partnership.* Thereby Silberman proved another of the main points in the crucial finding in *Berges v. Abraham, et al.*

Now it is true that Silberman did say that San Francisco Iron & Metal Company did not assume the obligation to Berges' assignor. But by the rest of his testimony he gave himself the lie direct.

Silberman testified that the rails which had been purchased from Goodyear Lumber Company were already in Abraham's possession when the partnership was formed. (Page 123.) So the obligation to pay for the rails had been incurred by Abraham before the partnership between Abraham, Silberman and San Francisco Iron & Metal Company had been formed.

Then what happened? Silberman said (page 123):

"When I came back I got into a discussion with N. Abraham and the steel rails were on hand at that time. I did not know where they came from, *but I learned where they came from. He told me where they had come from. I went over whatever assets he had and I found those rails were among the assets.* Also among the assets were a lot of army goods, tents, cots, mattresses,

and these were taken over. He had on hand some uncollected accounts *and these were taken over too* and subsequently, I think, the partnership collected some of those unpaid accounts."

(Page 124):

"We took over *all the assets of N. Abraham* and that included the book accounts."

(Page 124):

San Francisco Iron & Metal Co. "*did participate* in paying liabilities of the partnership. Outside of the Goodyear Redwood Lumber Co. *the San Francisco Iron & Metal Co. paid various liabilities of the partnership;* the amount I could not say."

Yet, despite this testimony, Silberman had the colossal nerve to tell the trial court that the partnership did not assume any of Abraham's antecedent debts.

That is—the partnership acquired *all* the assets of N. Abraham, including the steel rails bought from the Goodyear people and including *all* Abraham's uncollected book accounts, but did not assume any of Abraham's liabilities! That is, Abraham was stripped of his assets but was left with his liabilities!

But Silberman was not so sure that the partnership had not assumed the *Goodyear* claim. He said also (page 127):

His (Silberman's) brother "told me about the claim of the Goodyear Redwood Lumber Company after the claim was made; he just told me there was a claim of the Goodyear Redwood Lum-

ber Company. As to what I did about it with Abraham, well *I don't remember.* I really think that Abraham said he would take care of it, *but I really don't know, it is quite a while ago.*"

And he gave that testimony despite the fact as he said (R. 127):

"I refreshed myself yesterday; I read over the deposition that was taken to refresh my memory."

If he was still uncertain after refreshing his memory with former testimony, the only explanation is that he didn't dare say, flat-footedly, that this claim had not been assumed when the partnership acquired all the tangible and intangible assets of N. Abraham.

Further on page 127 of the record he said:

"I can't give you the exact date of this arrangement with Abraham; it was sometime in November, 1926. At that time I went over the books and pages and as to finding current bills on hand I did find some small bills, yes. *I really don't know* whether those small bills were paid by the partnership or not. I think Mr. Abraham took care of those personal bills himself. I really would not say *but I know they were taken care of.*"

Again, we say, the witness was afraid to state that the partnership had not assumed and paid these bills.

This lack of candor in the witness and his failure to remember even after he had refreshed his memory, combined with his square testimony that the partnership had acquired *all* the assets of N. Abraham, are

sufficient to convince all that the partnership did assume Abraham's obligations, too.

We called this testimony to the attention of the Circuit Court of Appeals on this second appeal and in reference thereto that court in its first opinion said (R. 163):

> "This evidence alone was sufficient to support the implied conclusion of the trial court that the San Francisco Iron & Metal Company had assumed the obligations of the copartners. It is clear that the judgment and findings in action No. 204,668 are conclusive that the indebtedness sued upon was that of the partnership. It is therefore of no importance whether the findings in the superior court No. 204,668 relative to the assumption of the entire debt by the San Francisco Iron & Metal Company is conclusive upon the parties to the action. We may assume as appellant contends that without additional evidence it is not."

Plainly the court was right; just as the trial court was right when its finding here, based both upon the judgment-roll in *Berges v. Abraham, et al.*, and upon Silberman's testimony, followed the crucial finding in that case.

Furthermore, Silberman's testimony showed that finding IV-A (the crucial finding on which we rely) was material to the judgment in the *Berges* case. For Silberman said that the Goodyear claim was an obligation of Abraham prior to the formation of the partnership and that the San Francisco Iron & Metal Company assumed only the obligations of the partnership.

If that were true then the judgment in the *Berges* case against Silberman and San Francisco Iron & Metal Company was erroneous and should have been against Abraham exclusively. Therefore material issues in the case plainly were (a) whether the Goodyear claim was originally against the partnership; (b) whether that claim was originally only against Abraham but had been assumed by the partnership; and (c) whether the claim was only properly against Abraham. These issues involved the relations that then and previously had existed between the defendants. The trial court determined these issues in finding IV-A on which we rely. Hence that finding was material and was in order and the judgment properly reflected that fact when it recited that it was made "pursuant" to the findings.

III.

SUMMARY OF ARGUMENT.

A. Re first error specified.

1. Petitioner cannot raise this point because the bill of exceptions does not include any findings or conclusions proposed by petitioner. (Page 19.)

2. Petitioner itself deemed the trial closed before it attempted to submit any findings or conclusions; and petitioner acted accordingly. (Page 21.)

3. On submission of the case petitioner merely asked the court to make findings; petitioner did not ask for any special findings or submit any and request the court to make them. (Page 22.)

4. The "progress of the trial" had in fact concluded before petitioner had submitted any proposed or requested findings or conclusions. (Page 23.)

5. The authorities are entirely against petitioner on this point. (Page 25.)

6. The authorities cited by petitioner are not in point. (Page 33.)

B. Re second error assigned.

1. Circuit Court of Appeals refused to "notice plain error" because it considered that on the merits substantial justice had been done. (Page 36.)

2. "Plain error" will only be noticed where failure to notice it will result in serious injustice. (Page 38.)

3. By the law established on the first appeal there was no merit in petitioner's appeal. (Page 39.)

4. By a California case decided after the first decision on this appeal the law is settled in California against petitioner on the merits. (Page 39.)

5. The binding effect of the findings in *Berges v. Abraham* was decided adversely to petitioner upon the first appeal and has become the law of the case. (Page 41.)

6. The findings in *Berges v. Abraham* are binding upon petitioner because (a) an examination of the record in that case shows that the court there decided the relationships among the defendants (page 43); (b) the action here is founded upon the judgment in *Berges v. Abraham* and is not a collateral proceeding among the defendants in that case (page 49); (c) the

testimony of one of the defendants, produced by petitioner, confirms the findings. (Page 50.)

C. Judgment is supported by findings and conclusions.

1. In law San Francisco Iron & Metal Co. became principal and Abraham became surety. (Page 52.)

2. In law Fidelity & Casualty Co. of N. Y. and Century Indemnity Co. were not co-sureties. (Page 52.)

3. The undertaking of petitioner was that there would be applied to any judgment for plaintiff in *Berges v. Abraham* the very assets which San Francisco Iron & Metal Company had agreed to apply in liquidation of Berges' claim. (Pages 53.)

4. It was petitioner's undertaking that released such assets from attachment and permitted their loss through the bankruptcy of San Francisco Iron & Metal Co.

5. The authorities amply support the judgment as based upon the findings and conclusions. (Page 56.)

IV.

FIRST ERROR SPECIFIED.

The complaint is that substantial prejudice resulted to petitioner by the refusal of the Circuit Court of Appeals "on technical grounds of procedure" to review "the actions and rulings on the findings and conclusions".

The Circuit Court of Appeals said (R. 169-170):

> "Many of the Indemnity Company's assignments of error, and five of the seven specifications of error in its brief, are based upon the failure of the trial court to make certain special findings requested by the Indemnity Company. These assignments and specifications cannot be considered because the findings were proposed after the trial had been completed and after the court had announced its decision and hence did not occur during the trial. Continental Nat'l. Bk. v. Nat'l. City Bk. of N. Y., 69 F. (2d) 312, 317, and cases therein cited."

The question in procedure then is—when did the progress of the trial end within the meaning of the statute? (28 U. S. C. A. Title 28, Sec. 875.)

First.

If we assume for a moment that petitioner is correct it avails petitioner nothing.

The bill of exceptions (R. 52-131) does *not* include any findings or conclusions proposed by petitioner. It is true that at pages 21-35 of the record there appears proposed Special Findings and Conclusions of Law which the document states are submitted by Century Indemnity Company "in lieu of those proposed by plaintiff". But this document is an "estray" for it is not included within the Bill of Exceptions. It is not even endorsed as "filed"—only as "lodged" (R. 35); but documents properly a part of the clerk's records are endorsed "filed", with the date, and not "lodged". (See all other documents in the record.)

Now any rulings "during the progress of the trial" on which an appellant wishes to found error must be incorporated in, and authenticated by, a bill of exceptions.

> "The rulings of the court *in the progress of the trial of the cause,* if excepted to at the time, *and duly presented by a bill of exceptions,* may be reviewed" etc.
>
> (Sec. 875 U. S. C. A.—Title 28.)

All the bill of exceptions does (R. 130-131) is to state that both parties prepared and lodged with the court proposed findings of fact and conclusions of law and that the court signed and filed the findings and conclusions prepared by respondent. As the findings and conclusions proposed by petitioner are not included in the bill they could not be considered on the appeal; and in consequence the Circuit Court of Appeals could not consider any error of the trial court in rejecting such findings and conclusions.

On this ground, then, findings and conclusions of law proposed by petitioner must be disregarded in any event, even though the Circuit Court of Appeals may have refused, on other and erroneous grounds, to give them any consideration.

Our position has been expressly approved in identical situations in these cases:

> *Davis v. United States,* 67 Fed. (2d) 737 (C. C. A.—10);
>
> *Greenway v. United States,* 67 Fed. (2d) 738 (C. C. A.—10);

Kolton v. United States, 67 Fed. (2d) 741 (C. C. A.—10),

and the authorities which these cases cite.

Finally these same cases also hold, quoting from the *Davis* case:

> "But the sufficiency of the evidence to support the findings must be appropriately raised by motion for judgment, request for declaration of law, or other like motion. Such a motion or request, and the ruling thereon, are not a part of the record proper, and must be presented by a proper bill of exceptions."

Numerous authorities from this court and various Circuit Courts of Appeal are cited. The bill of exceptions (R. 130-131) fails to show, properly of record, that any such thing occurred.

Second.

The very fact that petitioner failed to have its proposed findings and conclusions (whatever they were) inserted in the bill of exceptions is proof conclusive that *petitioner itself deemed the "progress of the trial" ended, either when the case was submitted or, at latest, when the trial court made its order for judgment.* (R. 21.) For in such case petitioner's proposed findings and conclusions, presented for consideration after progress of the trial had ended, should not and could not be incorporated in the bill of exceptions. Petitioner apparently felt they should not be included in the bill.

The bill of exceptions (R. 131) states this:

> "That all the material evidence for determination of this cause has been set forth herein, *as well as all proceedings on the trial thereof.*"

Since this is true and since the bill of exceptions does not contain any findings or conclusions proposed by petitioner it must be that any such findings or conclusions were not presented to the trial court "during the progress of the trial".

Third.

The bill of exceptions in the record read (pages 130-131):

> "Mr. Wisecarver (attorney for petitioner). I wish also at this time to make a motion for judgment *and findings.*
>
> Mr. Hadsell (attorney for respondent). We do the same on behalf of the plaintiff, for the full amount, and request findings.
>
> Thereafter, the case was orally argued before the court and *was submitted* upon written briefs. *Thereafter* and on June 1, 1934, and outside the presence of the parties, the Court made and entered its order *granting judgment to the plaintiff with findings to be submitted.* Thereafter proposed findings of fact and conclusions of law were served and lodged with the Court by plaintiff, and within the time allowed by law the defendant served and lodged its proposed special findings of fact and conclusions of law in lieu of those proposed by the plaintiff.
>
> Thereafter and on June 16, 1934 the Court, without the presence of the parties, signed the

proposed special findings of fact and conclusions of law of the plaintiff and filed same on said date as the findings and conclusions of the court, and judgment was entered on said June 16, 1934."

The order of the trial court for judgment is at page 21 of the record and reads:

"This case having been heretofore heard and submitted and due consideration having been had, *it is ordered that judgment be entered for plaintiff*, with interest and costs, upon findings of facts and conclusions of law to be presented."

So, plainly the trial had been concluded with the submission for decision.

The court will note:

1. That petitioner's motion for findings did not specify any finding whatever that petitioner desired the trial court to make and that petitioner with its motion did not offer any findings;

2. That petitioner's motion as made was for "findings" *generally* and not for any "*special* findings" then and there offered;

3. That petitioner's motion did not specify, even generally, what petitioner thought or desired the purport of the findings should be and that the petitioner did not state any grounds for the motion.

The court further will observe that petitioner's challenge to the findings actually made comes by a single assignment of error filed after judgment (R. 138, Assignment No. 21) and directed only to one

finding, and that petitioner's challenge to failures to find come by other assignments numbered 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20 and 24.

The court will also note from Rule 42 of the District Court (quoted in full at page 5 of the Petition) that in this action the making of special findings of fact is "in the discretion of the court" and that the rule provides the procedure by which the trial court will exercise such discretion.

So it is important that there shall not be confused into one thing two very separate things, namely:

(a) a request for particular findings to a particular effect and in particular words—that is, a request that the court adopt findings that the party has formulated and submits to the court with the request; and,

(b) a request that when the trial court shall decide a case on the law side it shall exercise its discretion to make findings by directing that findings shall be made to conform to the court's decision.

To ask for a particular finding to a particular effect is one thing; to ask generally that the court make findings is quite another thing.

To ask the court to make a particular finding to a particular effect is like asking the court to give some specific instruction to a jury. When the request for the instruction is made the instruction must be submitted with the request. Otherwise the trial court does not err in failing or refusing to give the instruction.

So here. If, when petitioner asked the trial court to make findings, the petitioner wanted findings in particular words or to a particular effect, petitioner then and there should have presented the formulated findings that petitioner wanted the trial court to make. But petitioner did not do so. The trial then closed and the cause was submitted for decision as the record clearly states. There was no reservation made by either party of any right to offer or file proposed special findings in support of such party's motion for findings. The submission for decision was complete. The "progress of the trial" was done.

When the trial court, then, was considering the case after the parties' submission of the case for decision, *the court did not have before it for consideration any "special findings" whatever as requested by either party.* It was under these circumstances that subsequently, as the bill of exceptions states, "the court made and entered its order granting judgment to the plaintiff with findings to be prepared".

Very apposite to our case are the words of this same Circuit Court of Appeals in a case decided some weeks later than the first decision on the present appeal—*Lando v. Equitable Life Assur. Soc.*, 84 Fed. (2d) 640. Justice Denman, who dissents here on one phase of our case, there said for the court:

> "A jury was properly waived, and prior to the submission of the case the insured appellant moved for judgment in his favor and also moved for special findings. *Appellant did not specify the ultimate facts desired to be found. His mere*

motion that the court make findings one way or another as to the ultimate facts is not a request for findings of specific facts sufficient in itself to warrant a review of the evidence. Seaboard Surety Co. v. U. S., 84 F. (2d) 348, decided by this court on June 8, 1936. So far as advising the lower court of the claim that the evidence required a judgment in his favor, the situation is the same as if the appellant had made no more than a motion for such a judgment."

See reference to this case in note to the court's second opinion here. (R. 170.)

Mr. Paul P. O'Brien, Clerk for the Circuit Court of Appeals for the Ninth Circuit, published in 1929, for the help of attorneys conducting appeals, a book entitled "Manual of Federal Appellate Procedure" (Second Edition) to which he also publishes cumulative supplements. In the "1937—Cumulative Supplement", dated September 1, 1937, he states at pages 9-10:

"A request for judgment, or for a declaration of law or for special findings of fact and conclusions of law, made after the case has been submitted, and the trial judge has announced his decision, but before formal judgment has been entered, comes too late and is not made 'during the progress of the trial' as required by Par. 700 R. S. (28 U. S. C. A. Sec. 875). It is essential that such motions me made at or before the submission of the cause for decision, both in a case submitted upon an agreed statement of all the ultimate facts, as well as in cases tried by the court without a jury."

His citations are:

Continental Bank v. National City Bank etc. (C. C. A. 9), 69 F. (2d) 312;

Babbitt Bros. Trading Co. v. New Home Sewing Machine Co. (C. C. A. 9), 62 F. (2d) 530, 536, concurring opinion of Wilbur, C. J.;

Columbia Nat. Life Ins. Co. v. Griffith (C. C. A. 8), 73 F. (2d) 244, 248;

Sanfeliz v. Bank of Nova Scotia (C. C. A. 1), 74 F. (2d) 338;

Huron College v. Union County Trust Co. (C. C. A. 8), 77 F. (2d) 609;

Inland Irving Nat. Bank of Chicago v. American Flange and Mfg. Co. (C. C. A. 7), 75 F. (2d) 553;

First Nat. Bank of San Rafael v. Philippine Corp. (C. C. A. 9), 51 F. (2d) 218;

Lando v. Equitable Life Ass. Society of U. S. (C. C. A. 9), 84 F. (2d) 640;

Armstrong v. Metropolitan Life Ins. Co. (C. C. A. 8), 85 F. (2d) 185, and the present case of

Century Indemnity Co. v. Nelson (C. C. A. 9).

Of these cases *Continental Bank v. National City Bank etc.* (C. C. A. 9), 69 Fed. (2d) 312, is an important case. Judge Mack of New York, wrote the opinion for the court, saying:

> "Nevertheless, *the question remains whether or not rulings made and exceptions thereto taken, not merely after submission of the case, but even after the announcement by the court of its opinion and intended judgment, but before rendition*

of the final judgment, are made and taken 'in the progress of the trial'. In the opinion in Edwards v. Robinson, supra (8 Fed. (2d) 726, 727—C. C. A. 9), an examination of the record discloses what is not entirely clear from the opinion, that there, as here, the declarations of law were requested some time *after* the judge had filed his opinion which concluded with the words 'the complaint will be dismissed'—but also some time *before* the trial judge signed and filed the actual judgment of dismissal and his own findings. This court there said that no motion or request for a finding in favor of plaintiff was made 'until long after the close of the trial, and not until 10 days after a decision in favor of the defendants had been announced by the court. Under such circumstances, we are without jurisdiction to consider the sufficiency of the testimony to support the findings'. There are also expressions of opinion in other cases that, for these purposes, *the progress of the trial is concluded when the cause is submitted to the judge, or at least when he announces his decision.* See Babbitt Bros. Trading Co. v. New Home Sewing Machine Co., 62 F. (2d) 530, 535, 536 (C. C. A. 9th, 1932) (Judge Wilbur's concurring opinion); Merriam v. Huselton, 45 F. (2d) 983 C. C. 8th, 1930); United States v. Smith, 39 F. (2d) 851, 854 (C. C. A. 1st, 1930); Southern Surety Co. of Des Moines v. United States, 23 F. (2d) 55, 58 (C. C. A. 8th, 1927); Ewert v. Thompson, 281 F. 449, 450 (C. C. A. 8th, 1922). This interpretation accords with the function of the request for ruling and exception to the denial thereof; *it is to direct the judge's attention to the specific proposition of law relied upon, so that prior to the announcement of his conclusions*

he may have the opportunity to consider it. True it is that after entry, and until the end of the term during which the judgment has been entered, it may be set aside and a new trial granted or if tried without jury, a contrary judgment entered. That, however, is a matter entirely within the court's discretion, and offers no guide to the scope of the general rule. We conclude that there were no rulings 'in the progress of the trial', properly before us for review, other than that on the evidence hereinabove considered."

This decision was made for the Ninth Circuit long before the second trial of our case and was therefore available as a guide to petitioner on such trial.

Thereupon the Continental National Bank petitioned this court for a writ of certiorari in a cause entitled *Continental National Bank v. National City Bank of New York,* and numbered 34 in October Term, 1933. The petition was denied. (293 U. S. 557, 79 L. Ed. 659.) One of the reasons specifically urged for the petition was that the decision of the Circuit Court of Appeals on the question in procedure, as above quoted, "is untenable and in conflict with the decision of another Circuit Court of Appeals on the same matter and in conflict with the weight of authority". (See Pet. page 11.) Said petitioner:

"This case having been tried before a judge, without a jury, on a stipulation of facts spread at large upon the record and having special findings of fact and conclusions of law signed incorporating such stipulation of facts, the Circuit Court of Appeals erroneously refused to review the facts to ascertain if the same supported the

judgment, because of an alleged failure to request a declaration of law *prior to the minute order for judgment.*" (Citing cases.)

Also (page 12):

"If such request for a declaration of law were necessary, then timely application therefor was made by petitioners as such application was made before final judgment and in the same term of court." (Citing cases.)

This reason for the petition was stated also in the specifications of errors (Pet. page 21) and at pages 33-36 of the petition authorities and argument are presented for the contention. The respondent filed a brief in opposition to the petition wherein at pages 19-23 respondent distinguished or discounted petitioner's authorities and cited many authorities against petitioner's contention. Therefore we would urge upon the court that its denial of the petition was in effect an affirmance of Judge Mack's opinion and is decisive against the petitioner in the present proceeding.

We fortify this conclusion with what this court itself, in *Arthur C. Harvey Co. v. Malley,* 288 U. S. 415, 418, 77 L. Ed. 866, 867, approved as rightly said in that case by the Circuit Court of Appeals for the First Circuit:

"Exceptions, *following an order of judgment,* to alleged rulings in a written opinion of the judge assigning reasons for ordering a judgment for either party, *are not rulings in the course of the trial.*"

So here—exceptions to findings proposed by respondent and adopted by the court *after* the order for judgment for respondent was made "are not rulings in the course of the trial"; and the same is true of exceptions to the trial court's rejection of findings proposed by petitioner (appellant) *subsequent* to the order for judgment.

The specific order of the court in our case was that "judgment be entered for plaintiff * * * upon findings of fact * * * to be presented". Thereby the court had determined what the findings should do; namely, that the findings should find the facts as respondent contended them to be and as entitled plaintiff to judgment. In effect the trial court had then ruled on the facts and the law and the trial had then ended in any event—even if the trial had not ended previously when the parties had unreservedly submitted the cause for decision. All that remained to be done was to formulate findings that should comply with the trial court's order for judgment. There was to be no further "trial".

Rule 42 of the District Court does not help petitioner. *The purpose of that rule was not to extend the trial but simply to provide a means whereby the trial court would secure aid in formulating findings expressive of a decision already rendered.* The Circuit Court of Appeals very properly so held in its last opinion for the reasons there stated. (R. 170, Note 1.)

This view of the rule is embodied, in effect, in O'Brien's 1937 Supplement where he states at page 9:

"The making of special findings of fact in an action at law, tried by the court, on the waiver of a jury, is discretionary with the trial court, and its action in making such findings, in refusing to make requested findings, or in refusing to amend findings made, is not subject to exception, or to a subsequent review in a federal appellate court",

and cites:

Denver Live Stock Com. Co. v. Lee (C. C. A. 8), 18 F. (2d) 11, 16;

Modoc County Bank v. Ringling (C. C. A. 9), 7 F. (2d) 535, 536;

Kansas Society Life Ins. Co. v. Shirk et al. (C. C. A. 10), 50 F. (2d) 1046.

Later, at page 11, O'Brien states:

"If a party seeks to have reviewed the question whether the record contains any substantial evidence to support the findings and judgment against him, it is incumbent upon him to make a motion for judgment in his favor on that ground, or to request a declaration of law to that effect, or to take some other equivalent step, and secure a ruling by the trial court, and to take exception to such ruling (and include the same in bill of exceptions)",

and cites to his statement:

Federal Intermediate Credit Bank of Omaha v. L'Herisson (C. C. A. 8), 33 F. (2d) 841, 843;

Lyle v. Phillips Petroleum Co. (C. C. A. 8), 72 F. (2d) 347;

Fidelity & Deposit Co. of Maryland v. U. S. ex. rel. Woods (C. C. A 9), 72 F. (2d) 828;
Mittry Bros. Const. Co. et al. v. U. S. etc. (C. C. A. 9), 75 F. (2d) 79.

See, also,

Huron College v. Union County Trust Co. (C. C. A. 8), 77 F. (2d) 609;
McLaughlin v. Pac. Lumber Co., 293 U. S. 351, 55 S. Ct. 219, 79 L. Ed. 423;
U. S. v. Martin, etc. (C. C. A. 10), 80 F. (2d) 460;
Century Furniture Co. v. Bernhard's Inc. (C. C. A. 9), 82 F. (2d) 706;
Lando v. Equitable Life Ass. Society of U. S. (C. C. A. 9), 84 F. (2d) 640.

Plainly petitioner had not complied with any of these requirements.

The cases cited by petitioner are not against us.

In *Alexander v. Machan*, 147 U. S. 72, there were sixteen exceptions to findings and thirty-five exceptions to refusals to find; and the statement of this court, as quoted from that case by petitioner, is qualified by the clause "and an exception be taken". But the court's opinion does not say what the procedure should be and the report does not disclose what the actual procedure was. So the opinion is of no help here.

The case of *Mercantile Trust Co. v. Wood*, 60 Fed. 346, is in our favor because it says, as quoted by petitioner:

> "The finding of the court, whether general or special, performs the office of a verdict of a jury. When it is made and filed the trial is ended. *Exceptions to the findings* or to statements of legal conclusions contained in it, or in an opinion in which it is contained, or in an opinion filed with it, *avail nothing.* They are as futile as exceptions to the verdict of a jury."

So exceptions to the findings in our case "avail nothing".

Neither does *U. S. F. & G. Co. v. Board of Commissioners,* 145 Fed. 144, aid petitioner. The same judge wrote the opinion there as wrote the opinion in *Mercantile Trust Co. v. Wood,* supra, and cited the earlier case, with others, as deciding

> "The trial ends only when the finding is filed, or, if no finding is filed before, when the judgment is rendered."

But, for the reason that the trial is ended when the findings are filed, there cannot be any exception to the findings as the exception does not occur "during the progress of the trial". Nor, after findings filed, can there be any exceptions to any failures to make findings; for the trial is ended and such exceptions come too late.

Petitioner's fourth case, *Thompson-Starrett Co. v. La Belle Iron Works,* 17 Fed. (2d) 536, is also favorable to us rather than to petitioner. The quoted language:

> "It seems to us a needless and idle form to require the party aggrieved to request a ruling that putative future findings, *or special findings already made,* are without any evidence, and we regard an exception *taken on that ground before final action of the court* an exception to rulings made 'in the progress of the trial' "

only means that it is sufficient, where special findings have already been made, to except, *before final action of the court,* on the ground that such findings are without evidence. But when findings have been filed final action has been taken and an exception comes too late—the very thing that has happened in our case.

The correct procedure was forcibly stated by this court in *Fleischmann C. Co. v. U. S.,* 270 U. S. 349, 70 L. Ed. 624, in these words:

> "To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, *or present the propositions of law to the court and obtain a ruling on them.* Norris v. Jackson, supra, 129 (9 L. Ed. 609); Martinton v. Fairbanks, 112 U. S. 673, 28 L. ed. 863, 5 Sup. Ct. Rep. 321. That is, as was said in Humphreys v. Third Nat. Bank, 21 C. C. A. 538, 43 U. S. App. 698, 75 Fed. 855, 'he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. *In*

this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits'."

Petitioner failed completely to follow these requirements.

V.

SECOND ERROR SPECIFIED.

The claim is that, despite insufficiency of assignments and specifications of error, there is such "plain error" in the record that the Circuit Court of Appeals, in ~~its~~ *second* opinion on this appeal, should have passed on the merits and should have reversed the judgment.

(a)

Petitioner admits (Pet. pages 6-7) that the Circuit Court of Appeals, in its *first* opinion on this present appeal, decided the merits of the case against petitioner. Petitioner states:

"Notwithstanding a technical outlook on the procedural aspect of the case the Circuit Court of Appeals commented on the merits of the appeal and concluded that the judgment possessed evidentiary support (R. 163); that the judgment was supported by the findings of fact (R. 162); that the judgment was not contrary to the law of the case (R. 162); and that there was no error in the rulings on evidence (R. 162). *It saw no occasion to notice plain error (R. 164).*"

If, then, the Circuit Court of Appeals had, in its *second* opinion, gone again into the merits there is no reason to believe that the result would have been any different.

Why the Circuit Court of Appeals refused, in its *second* opinion, to go into the merits is clear enough.

For the *first* opinion, while finding sufficient defects in the record to dispose of the appeal on technical grounds alone, nevertheless gave consideration to the merits also (R. 162-164) and then concluded:

> "There is, therefore, no reason for relaxing our rule with reference to the specifications of error and there is no basis for relaxing the rule with reference to assignments of error as should be done only in case of a plain error unassigned (rule 11) *and so clearly prejudicial as to result in injustice.* In re Morgan (C.C.A. 6), 26 F. (2d) 183; Mutual Life Ins. Co. v. Parkinson (C.C.A. 6), 72 F. (2d) 759."

That is, in the court's view, any refusal of the court to recognize unassigned (or insufficiently assigned) plain error on this appeal would not be "so clearly prejudicial as to result in injustice". When, therefore, the court in its *second* opinion concluded (as it had already concluded in its first opinion) that the errors on which petitioner really relied were not assigned, or were not sufficiently assigned, it had no reason to go further to examine the merits under any claim of "plain error unassigned". When the two opinions are taken together they must be deemed to

hold that on this appeal the court would not overlook failures in assignments and specifications and go into the merits of the case on the basis of unassigned plain error—all for the reason that refusal to do so was not "so clearly prejudicial as to result in injustice".

(b)

Unassigned plain error will only be noticed where refusal to do so will be "so clearly prejudicial as to result in injustice".

In re Morgan, 26 Fed. (2d) 183 at 184;

Mutual Life Ins. Co. v. Parkinson, 72 Fed. (2d) 759 at 760;

Mahler v. Eby, 264 U. S. 32 (68 L. Ed. 549 at 557);

Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811.

The question then is:

Would that be the case here?

In its first opinion the Circuit Court of Appeals unanimously answered "no". After rehearing it maintained its stand by majority vote.

Even the dissenting opinion on the second decision on this appeal does not say that the merits of the case should be otherwise decided than on the first decision on this appeal. Mr. Justice Denman simply contends that the decision on the rehearing should be on the merits and not on technical procedure. For in his view there were sufficient assignments to justify that course.

(c)

In our statement of the case we have shown that on the first appeal the Circuit Court of Appeals clearly declared the principles that should govern the decision of this case. On the retrial the parties did two things—*first*, they introduced the *entire* record from the first trial (R. 56-119) and *second* the defendant (petitioner here) introduced the testimony of one of the Silbermans. (R. 119-130.) The testimony of Silberman was the only new evidence. We have already analyzed his testimony and have noted what the Circuit Court of Appeals said about it. (This brief pages 11-16.) What Silberman had to say has not changed the essential facts. The law established for the case on the first appeal controls on this appeal. Respondent on the retrial provided, through the stipulation of petitioner itself, the facts which brought the case within the principles enunciated by the Circuit Court of Appeals on the first appeal. Hence there is no error, much less a plain error, in the affirmance of the judgment on this appeal.

(d)

The second decision on this second appeal was rendered June 7, 1937. Petitioner promptly filed a petition for another rehearing and respondent replied. In our reply we called the attention of the Circuit Court of Appeals to a case decided by the Supreme Court of California on June 28, 1937, entitled *Sanders v. Magill,* 94 Cal. Dec., page 34, where that court fully confirmed our position. There Magill executed a note

for $15,000.00 to a bank which he secured by a deed of trust upon real property. Later Magill transferred the property to one, Lyon, who, by Magill's deed to him, assumed and agreed to pay the encumbrance. At a later date Lyon endorsed and guaranteed the note at the bank and also pledged with the bank certain shares of stock which became the subject matter of the suit. The court said:

> "By this transaction, Lyon became the principal and the Magills the sureties of said note. (Braun v. Crew, 183 Cal. 728; Williams v. Naftziger, 103 Cal. 438, 440; Tompkins v. Powers, 106 Cal. App. 464, 466, and authorities cited in last cited case.) No act of Lyon or of any subsequent owner of said real property could affect or in any way alter this right of the Magills without their consent.
>
> A. H. Magill, being a surety on said note, even though he was the original principal thereon, upon paying said note under compulsion, or voluntarily acquiring the same by assignment was subrogated to all rights of the bank in and to said note. (Beach v. Waite, 21 Cal. App. 304, 307; Vincent v. Garland, 86 Cal. App. Dec. 5.) By right of subrogation, or as the owner of said note by written assignment from the bank, Magill could proceed against all persons liable for the payment of the balance due on said note. The acquiring of an obligation by the surety does not extinguish the obligation, but the same remains in full force and effect in so far as the rights of the surety to recover from third parties liable upon the obligations are concerned. The bank then is in error in contending that the pleadings and evidence show no right of recovery exists in favor of Magill.

> Magill, not only had the right to pursue any endorser of said note who was personally liable for the balance due thereon, *but he was entitled to any existing securities given for the purpose of securing payment of said promissory note.* No rule of law is more firmly established than that a surety upon payment of the principal obligation succeeds to all the rights of the principal in and to said obligation. (Secs. 2848 and 2849, Civ. Code; 23 Cal. Jur., p. 1078.)"

Accordingly, the court affirmed the judgment in Magill's favor against the bank *for the recovery of the stock pledged by Lyon to secure the note.*

In our case Abraham is Magill and the San Francisco Iron & Metal Company is Lyon and the stock is the bond of the Century Indemnity Company and the bank is the Goodyear Redwood Lumber Company, Berges' assignor.

So the State Supreme Court has now established the law of the state in accordance with the decision of the Circuit Court of Appeals in our case and petitioner has no ground left for complaint.

Doubtless the decision of the State Supreme Court convinced the Circuit Court of Appeals all the more firmly that its refusal to notice petitioner's claim of unassigned plain error did not do petitioner any injustice.

(e)

Petitioner asserts that the findings and judgment in *Berges v. Abraham et al.* were not binding among the defendants in that case and hence the finding in

the judgment roll that San Francisco Iron & Metal Company assumed the obligation of the other defendants to Berges' assignor cannot be used against petitioner in this case, surety though it was for San Francisco Iron & Metal Company.

We have shown already (this brief pages 3-6) that this particular finding did resolve an issue as among the defendants themselves in *Berges v. Abraham, et al.*

Moreover, this very point was strongly urged by petitioner to the Circuit Court of Appeals on the first appeal. (Appellee's Brief, pages 18-23.) The appellant (respondent here) contended, to the contrary, that the finding bound the defendants *inter sese* in the *Berges'* case. (Appellant's Brief, pages 18-27.) With these contentions before it the Circuit Court of Appeals ruled on the first appeal that San Francisco Iron & Metal Company had assumed the obligations of the other defendants to Berges' assignor and was therefore bound to save Abraham harmless—in consequence of which (as the court also held) the surety of Abraham (Fidelity & Casualty Company of New York, represented by Nelson) which had purchased the judgment from Berges was entitled to enforce that judgment against the San Francisco Iron & Metal Company and hence against its surety, Century Indemnity Co.

In other words, this question of the binding effect of the judgment in the *Berges* case as among the defendants therein themselves was decided adversely to

Century Indemnity Co. on the first appeal; and that decision is now the law of this case.

(f)

There are many other reasons why the defendants in the *Berges* case (and therefore their respective sureties) are bound by the findings and judgment therein as to the relationships among themselves.

In the original complaint paragraph I of the first count reads as follows (R. 59):

> "That at all times herein concerned defendants, N. Abraham, H. Silberman, L. Silberman and 1st Doe to 10th Doe were copartners doing business under the name of N. Abraham Mercantile Company; that at all times herein concerned defendant, San Francisco Iron & Metal Company, was a corporation duly organized and existing under and by virtue of the laws of the State of California."

The court will carefully note that not one word is here said about the relation, if any, between the individual defendants and San Francisco Iron & Metal Company.

In paragraph IV of the first count (R. 60) the pleader alleges "that within four years next preceding the commencement of this action defendants became indebted to Goodyear Redwood Lumber Company", Berges' assignor, in a stated sum of money, etc.

These two allegations in this form are carried into the other three counts. (R. 61-64.)

Thus the several counts as originally drawn fail entirely to show the relations between the defendants

and how each defendant, *or how San Francisco Iron & Metal Company,* in particular, became liable on the indebtedness pleaded by plaintiff. This joint liability, as far as the face of the pleading is concerned, might be shown to have arisen in one or the other of several dozen or more ways.

But plaintiff was not satisfied with her pleading in this respect. So she amended her complaint to add this allegation (R. 66-67):

> "That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, H. Silberman, 1st Doe to 10th Doe individually and as copartners doing business under the name of N. Abraham Mercantile Company; that about October, 1927, defendant San Francisco Iron & Metal Company received all or practically all of the property and assets of the other defendants in this paragraph mentioned and, in consideration thereof and other valuable considerations, specially promised and agreed to apply the said property and assets to the payment of the claim and matters herein sued for, but that said defendant San Francisco Iron & Metal Company has wholly failed to do."

Here, then, we see in the pleading, for the first time, exactly how San Francisco Iron & Metal Company became liable to plaintiff. It did not become liable on the original deal, says the pleader, between the individual defendants and plaintiff's assignor, Goodyear

Redwood Lumber Company, *but it became liable because of a subsequent transaction with the individual defendants wherein it took over the properties of the individual defendants and assumed and agreed to pay such defendants' obligations, including a debt due to plaintiff's assignor.* It does *not* allege that the individual defendants and San Francisco Iron & Metal Company bore any relation whatever to each other in the creation of the original indebtedness.

Now, did the finding of the trial court follow the amendment to the complaint? No, it did not do so; and herein lies an interesting point. The finding is (R. 84-85):

> "That prior to the commencement of this action and for good and valuable consideration, defendant San Francisco Iron & Metal Company, a corporation, agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company; that prior to the commencement of this action, defendant San Francisco Iron & Metal Company, a corporation, received all or practically all of the property and assets of the N. Abraham Mercantile Company and of N. Abraham, L. Silberman and San Francisco Iron & Metal Company, a corporation, individually and as joint adventurers and as copartners doing business under the name of N. Abraham Mercantile Company, and in consideration thereof and other valuable considera-

> tions specially promised and agreed to apply said property and assets to the payment of the said indebtedness to the said Goodyear Redwood Lumber Company, but that said defendant San Francisco Iron & Metal Company has wholly failed to do so."

That is, the San Francisco Iron & Metal Company "agreed to and did assume all of the obligations and liabilities of said N. Abraham Mercantile Company and of N. Abraham, L. Silberman and *San Francisco Iron & Metal Company,* a corporation, individually, *and as joint adventurers and co-partners doing business under the name of N. Abraham Mercantile Company*". So the San Francisco Iron & Metal Company, instead of becoming liable by a subsequent transaction as alleged became liable in the original creation of the debt to plaintiff's assignor as a joint adventurer and copartner with the individual defendants. Thus it is obvious beyond argument that the trial Court, for the purposes of the case and to determine the obligations of the defendants to the plaintiff, did go into and decide the relationships existing among the various defendants.

Another point. The original complaint alleged that H. Silberman and L. Silberman, among other individual defendants, were liable on the debt to plaintiff's assignor. (R. 59-60.) The amendment to the complaint alleged that San Francisco Iron & Metal Company had assumed the obligation of N. Abraham and H. Silberman but did not include the obligation of L. Silberman. The finding of the court, however, excludes H. Silber-

man and includes L. Silberman. Do not these things show conclusively that the court in *Berges v. Abraham* did determine the relations between the parties?

There is yet another reason why the court had to determine and did determine the relation between the defendants. Three individuals and a corporation were made defendants. Did each personally participate in the deal with plaintiff's assignor? Or, was there such a relation between the four defendants that any one of them, in making such deal, would bind the others? The complaint alleged a copartnership between the individual defendants. On that basis any partner could bind the other individual defendants. But the original complaint showed no relationship between the individual defendants and the corporate defendant but simply alleged that all defendants became indebted to plaintiff's assignor. The amendment to the complaint tied the corporation to the obligation by an alleged assumption of the liability. This would involve the question whether or not there had been, as alleged, a transaction between individual defendants and corporate defendant after the original transaction between individual defendants and plaintiff's assignor. Obviously, to put liability on San Francisco Iron & Metal Company, the trial court would have to go into this question. The court found that in the original transaction certain (but not all) of the individual defendants and the corporate defendant were joint adventurers and copartners in the original transaction; and, further, that the corporate defendant had assumed and agreed to pay the entire liability. Therefore, anyone

as representative of all, could and did bind all. That is, the court, to determine how each defendant could be bound for the debt, had to determine whether each had to be found speaking for himself or whether one could be found speaking for all. The necessity to do this made it also necessary to determine the relation between the parties.

Therefore, in view of all these things, can it be thought that, subsequently, in some action between the defendants involving the question of liability between them on the debt to Berges' assignor, any defendant could contend for anything different than the court had already found? We cannot believe it.

Let us put the question to a practical test.

We have in *Berges v. Abraham* a judgment against defendants, jointly and severally, based upon findings wherein San Francisco Iron & Metal Company, as one of the defendants, has been found to have assumed the whole liability to the plaintiff.

Suppose we assume that the plaintiff, by writ of execution, had exacted full payment of the judgment from Abraham and thereupon Abraham, claiming that the corporate defendant had assumed and agreed to pay the debt to plaintiff, had brought suit against San Francisco Iron & Metal Company to recover the full amount paid by him. Would San Francisco Iron & Metal Company be allowed in that suit to say that it had not been a copartner or joint adventurer in the original transaction or that it had not assumed the obligations of the other defendants and that, in conse-

quence, it was not liable? To make that contention it would have to repudiate the essential determinations of the trial court in the *Berges* case.

Suppose, again, that Berges by writ of execution had exacted full payment of the judgment from San Francisco Iron & Metal Company and that, after payment, this company had brought suit to recover the full amount from each of the individual defendants on the ground that the company had not been a co-partner or joint adventurer in the original transaction and had not assumed the liability of the other defendants to Berges' assignor. Would San Francisco Iron & Metal Company be allowed to open those questions again, in view of the determination of those questions against it in *Berges v. Abraham?* For us it is unbelievable that it could do so.

The discussion on this topic which has preceded is intended to lead to our further contention that the rule which appellant invokes to the effect that a judgment for a plaintiff against joint defendants is not a judgment binding upon the defendants with respect to each other in subsequent litigation does not apply *where the subsequent litigation relates to that particular judgment and is founded upon it.*

To show our meaning, let us assume that after the judgment in the *Berges* case Abraham brought a suit for an accounting against the other defendants with respect to their various business affairs. Such suit would not be founded in any way upon the judgment in the *Berges* case or relate to it or grow out of it. In

such case it may well be that the judgment in *Berges v. Abraham* would not be binding between them as a determination of the legal relations between them.

But such is not our case. Here, in effect, one of the defendants, Abraham, has paid the judgment in full and is bringing suit to recover the full amount from another defendant upon the ground that such other defendant had assumed and agreed to pay the entire obligation. We say this is so because the relation between the two surety companies depends upon the relation between the two principals. Now, after the question of assumption of liability was made an issue and decided and judgment was rendered "pursuant" thereto and Abraham was compelled to pay the full amount, can it be possible that San Francisco Iron & Metal Company can still force Abraham to relitigate that question? Petitioner has cited no authority to that effect, and we confidently assert that there is none.

Such suit of Abraham would relate to that judgment. It would rest, or rather proceed, upon the determinations made in that judgment. On the most ordinary principles of justice that judgment should be deemed conclusive between them *with respect to settlements of that judgment.*

Suppose there had been this judgment jointly and severally against Abraham and San Francisco Iron & Metal Company but no finding, and hence no judgment, of assumption of total liability by the metal company. Suppose again that Abraham had paid the judgment in full and had brought suit against the metal company

for contribution. If petitioner is correct, then the metal company would be free to defend upon the ground that, notwithstanding the judgment, the metal company had not been at all liable with Abraham to the plaintiff Berges. Could any conclusion be more absurd?

Sureties are bound by judgments which bind their principals.

Corpus Juris., Vol. 50, page 196, Sec. 336;
California Jurisprudence, Vol. 23, pages 1062-1063;
Riddle v. Baker, 13 Cal. 295;
Pico v. Wehater, 14 Cal. 202 at 204;
Irwin v. Bockus, 25 Cal. 214 at 223;
Easton v. Boston Investment Co., 51 Cal. App. 246 at 251-252.

In *Key v. Oates* (Tex.), 280 S. W. 286, the court ruled (page 288):

> "The judgment in this case recognizes that L. E. Key, Darsey, and Wilie were the makers of the note, and therefore principals, and that the other obligors were sureties. Under the evidence introduced this relationship might well have been disputed, *but as the relationship of the parties was determined in the State Bank Case, and that judgment having become final, it cannot now be questioned.* The question left for the determination of the trial court in this case is: What is the amount of the liability of each of his cosureties to Oates by reason of his payment of the judgment?"

V.

JUDGMENT IS SUPPORTED BY FINDINGS AND CONCLUSIONS.

The effect of the findings is that, as among the defendants in the *Berges* case, the San Francisco Iron and Metal Company had assumed the obligations of the other defendants to Berges' assignor. This assumption of liability made San Francisco Iron & Metal Company sole principal and the other defendants sureties for San Francisco Iron & Metal Co. on the obligation to Berges' assignor.

Cutting Packing Co. v. Packers Exchange, 86 Cal. 574 at 577;

California Jurisprudence, Vol. 18, page 57, Par. 375;

Rowley—Modern Law of Partnership—Vol. I, page 707, Sec. 558;

Corpus Juris, Vol. 50, page 26, Par. 34;

Imperial Refining Co. v. Kanotex Refining Co., 29 Fed. (2d) 193 at 199;

Atlantic & N. C. R. Co. v. Atlantic & N. C. Co. (N. C.), 23 L. R. A. (N. S.) 223 at 231;

Corvallis Etc. Co. v. Portland Etc. Co. (Oregon), 163 Pac 1173 at 1178-1179.

Since, then, Century Indemnity Co., as surety for San Francisco Iron & Metal Co., was surety for a principal and Fidelity and Casualty Co. of N. Y., as surety for Abraham, was surety for a surety, the two surety companies were not co-sureties.

Corpus Juris, Vol. 50, page 279 and note 99;

Corpus Juris, Vol. 50, page 313, Par. 529;

Corpus Juris, Vol. 50, page 278;

Arant on Suretyship, page 11;
Arnold on Suretyship & Guaranty, page 266;
Stearns on Suretyship, Sec. 263, page 477 (3rd Ed).

Therefore this is not a case for contribution between the two surety companies.

We have seen from the testimony of Silberman that San Francisco Iron & Metal Company took over all the assets of the partnership or joint adventure. We have further seen both from his testimony and from the findings in the *Berges* case that San Francisco Iron & Metal Company assumed all their obligations *and agreed to apply those assets to the satisfaction of the Berges' claim and any other obligations it had assumed.* When we look to the undertaking of Century Indemnity Co. as concerns San Francisco Iron & Metal Company we find it provides (R. 38-39):

> "* * * in consideration of the premises, and also in consideration of the release from said attachment of the property credits and effect attached, as above mentioned, does hereby undertake in the sum of Six Thousand and no/100 ($6000.00) Dollars, and promise that in case the Plaintiff recovers judgment in the action against defendants, San Francisco Iron & Metal Company, a corporation, H. Silverman and L. Silverman, said Defendants, San Francisco Iron & Metal Company, a corporation, H. Silverman and L. Silverman, will, on demand, redeliver the attached property credits and effects so released to the proper officer, to be applied to the payment of such judgment, or in default thereof, that said Defendants San Francisco Iron & Metal Company, a corpora-

> tion, H. Silverman and L. Silverman, will, on demand, pay to the plaintiff the full value of the property credits and effects released, not exceeding the amount of such judgment."

Now, therefore, is it not just, since San Francisco Iron & Metal Company assumed all obligations and had all assets of the former partnership but lost its property, credits and effects in bankruptcy and did not meet this obligation to Goodyear Redwood Lumber Company, and since petitioner's bond caused such property, credits and effects to be released from Berges' attachment and to be returned to the metal company and obligated petitioner to return such property, credits and effects to the sheriff to satisfy the judgment if the metal company did not do so, and since petitioner has not performed the obligation of its bond—is it not just, we ask, in view of all these things, that petitioner shall be compelled to meet the duty that it took upon itself by executing its bond?

The Circuit Court of Appeals said so on the first appeal. We quote:

> "If, therefore, the property seized by the sheriff was the property of the corporation *justice would require* that this property be first subjected to the payment of the judgment for which the corporation was primarily liable before the property of N. Abraham, one of the partners for which appellant is surety, or of the other partners, is applied to the judgment, although the corporation is only a co-judgment debtor upon the face of the judgment."

We do not have here merely a bond which obligates the petitioner to pay a sum of money. We have much more. We have a bond that obligates petitioner to restore to the sheriff's possession certain assets of San Francisco Iron & Metal Company which had been attached and which were properly to be devoted to payment of the Goodyear claim because the metal company had acquired all the assets of the partnership and had agreed to pay that claim. Before any attachment was levied Abraham had a right to demnd of the metal company that the attached property be devoted to payment of the claim. When the attachment was levied he still had that right. When petitioner, by its bond, enabled the metal company to get back its property Abraham still had that right; and since petitioner by its bond, had interfered with the application of that property to the payment of the claim Abraham had the right to demand of petitioner for Abraham's proper protection that petitioner either restore the property to the possession of the sheriff or pay the judgment up to the full value of the property. And since Abraham's surety had to take over the judgment his surety, represented in legal title by the plaintiff in this suit, is also entitled to compel petitioner either to restore the property or pay its value.

In *Davis v. Heimbach,* 75 Cal. 261, we have a situation which, by analogy, strongly supports our position. Heimbach gave his note to Davis and four persons went sureties for Heimbach on the note. McDaniel was one of these sureties. Later McDaniel, for certain considerations paid to him by Heimbach,

agreed himself to pay the whole debt to Davis. Davis brought this suit and took judgment against Heimbach and the four sureties. McDaniel and one of the other sureties paid the full amount. McDaniel then tried to force contribution from the two other sureties. The court denied relief because of the contract between Heimbach and McDaniel, saying:

> "that as long as it stands it is a good answer to an application for contribution whether by motion or action."

In our case the San Francisco Iron & Metal Company occupies the position of McDaniel. It likewise agreed to pay the whole debt. Therefore it couldn't come back on Abraham or either of the Silbermans for contribution in case it paid the whole judgment. But if San Francisco Iron & Metal Company would not be entitled to contribution from its co-debtors on the one side because it was obligated to pay the debt in full the converse must be true that if one of its co-debtors paid the full amount such co-debtor could recover the full amount from it.

The differences which we have here presented, with an assembly of many authorities, will be found discussed in a recent case in Alabama—*U. S. F. & G. Co. v. Yeilding Bros. etc.,* 143 So. 176 at 181-183.

A closely analogous case in principle is *Bender v. George,* 92 Pa. St. 36. The headnote accurately states the facts and decision:

> "A gave B a lease for a term of years. C and D were B's sureties. B assigned the lease to E, who assigned it to F, for whom H became security

as bail absolute for payment of the rent and performance of the covenants of the lease. F defaulted for the rent and D was compelled to pay the same to A. He then brought an action in the name of A, for the use of D, against H. Held, reversing the court below, that he could recover."

At page 39 the court said:

"Where two persons are equally liable to the creditor, if as between themselves, there is a superior obligation resting on one to pay the debt, the other, after paying it, may use the creditor's security to obtain reimbursement."

The form of action, we wish the court to note, was "debt"—a common law action.

The fact is that in law the bond of Century Indemnity Company took the place of the released assets that San Francisco Iron & Metal Company should have devoted to pay its obligation and to protect Abraham against loss.

Harding v. Minear, 54 Cal. 502 at 507.

Abraham as surety, upon satisfying the San Francisco Iron & Metal Company's obligation as principal to the Goodyear Redwood Lumber Co. (Berges), would be entitled to enforce the remedies of Berges against the San Francisco Iron & Metal Co., namely, the judgment and the security for the judgment (the substitute for the released assets) existing in the bond on release of assets from attachment; for our Civil Code Section 2848 says:

"A surety, upon satisfying the obligation of the principal is entitled to enforce every remedy

> which the creditor then has against the principal to the extent of reimbursing what he has expended."

Abraham and Century Indemnity Co. were not sureties on an equal footing. As between Abraham and San Francisco Iron & Metal Co., the latter was bound for the full amount and had a duty to save Abraham harmless. Since Century Indemnity Co. went surety for San Francisco Iron & Metal Company it too, in relation to Abraham, was in duty bound to satisfy the company's obligation for the protection of Abraham, particularly as its bond enabled that company to recover its assets from attachment and subsequently to dissipate them and so to cause them to be unavailable for satisfaction of the judgment and the protection of Abraham. Those assets should have been there to protect Abraham to the full when the adverse judgment in Berges' favor became enforcible by writ of attachment. As they were not available and Century Indemnity Company had agreed by its bond to make them available and as they should have been available for Abraham's complete protection, the Century Indemnity Company would be liable to Abraham if he had satisfied the judgment, just as the Civil Code section says. Abraham would be entitled to exercise Berges' rights.

Because of his preferred position over Centutry Indemnity Co. Abraham as surety was virtually as supplemental surety for Century Indemnity Co. as surety; that is, Abraham was surety for a surety. As

such he could recover in full from Century Indemnity Co.

50 *Corpus Juris,* page 314, Sec. 531, Article—Principal and Surety.

Abraham also had a surety, the Fidelity & Casualty Company of N. Y. It paid Berges and took an assignment of the judgment. Abraham then became liable to it for reimbursement. If Abraham fulfilled that obligation he, in effect, would satisfy the judgment and so could go, as shown above, against the Century Indemnity Company on its bond. As, *first,* Abraham was in duty bound to reimburse the Fidelity & Casualty Company and that duty had matured, and as, *second,* the San Francisco Iron & Metal Co. and its surety, Century Indemnity Company, had the duty of satisfying the obligation to Berges for the protection of Abraham by production of the assets released from the attachment or by payment of their monetary value as stipulated but had not done so and this duty had also matured, and as, *third,* Abraham's surety, Fidelity & Casualty Company, had had to pay what the Century Indemnity Co. should have paid for the benefit and protection of Abraham and his surety, the Century Indemnity Company was bound to respond to the claim of the Fidelity & Casualty Company of New York, as demand is here made that it do. Circuity of action is thereby avoided, namely, suit by Fidelity & Casualty Company of New York against Abraham and subsequent suit by Abraham against Century Indemnity Company. The end is inevitable that Century Indemnity Company must pay.

In fact, our position is supported by the next section (2849) of the Civil Code, which says that:

> "a surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor."

Berges here held as security the bond in release of attachment issued by the Century Indemnity Company for the benefit of San Francisco Iron & Metal Co. That company was obligated to save Abraham harmless and the Century Indemnity Co. by its bond was obligated to return the released assets or their equivalent in money as stipulated so that Abraham would be saved harmless. Therefore full satisfaction should be made, on equitable principles, out of San Francisco Iron & Metal Co. and its surety and nothing should be exacted from Abraham and his surety. So the Fidelity & Casualty as Abraham's surety, became entitled to the security held by Berges through San Francisco Iron & Metal Company, just as the Circuit Court of Appeals decided on the first appeal.

Dated, San Francisco, California,
January 21, 1938.

Respectfully submitted,
JOE G. SWEET,
Counsel for Respondent.

HADSELL, SWEET, INGALLS & LAMB,
D. HADSELL,
Of Counsel.

P. 1

SUPREME COURT OF THE UNITED STATES.

No. 362.—October Term, 1937.

The Century Indemnity Company, Petitioner,
vs.
G. Nelson.

Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 28, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

This cause went up by appeal from the District Court, Northern District, California. Of the twenty-eight assignments of error, eleven, based upon the trial court's refusal of certain requested special findings, were rejected by the Circuit Court of Appeals. It held the requests "were made too late", that "the findings were proposed after the trial had been completed and after the court had announced its decision and hence did not occur during the trial." To support this view it cited *Continental National Bank* v. *National City Bank*, (9th Cir.) 69 Fed. (2d) 312, 317, which affirms—"It is settled that they [assignments of error] came too late if made after judgment even though the trial judge, after judgment, granted leave to make the request."

requests for findings

A jury having been duly waived, the trial judge heard evidence. At the conclusion of this counsel for both sides made motions for judgment and findings. The minutes of May 31, 1934, show—"This case having been heretofore heard and submitted and due consideration having been had, it is ordered that judgment be entered for plaintiff, with interest and costs, upon findings of facts and conclusions of law to be presented."

The bill of exceptions recites—"Thereafter [after requests for judgment and findings] the case was orally argued before the court and was submitted upon written briefs. Thereafter and on June 1, 1934, [May 31?] and outside the presence of the parties, the Court made and entered its order granting judgment to the plaintiff with findings to be submitted. Thereafter proposed findings of fact and conclusions of law were served and lodged with the Court by plaintiff, and within the time allowed by law the defendant

served and lodged its proposed special findings of fact and conclusions of law in lieu of those proposed by the plaintiff. Thereafter and on June 16, 1934, the Court, without the presence of the parties, signed the proposed special findings of fact and conclusions of law of the plaintiff and filed same on said date as the findings and conclusions of the Court, and judgment was entered on said June 16, 1934."

June 16, 1934, "Special Findings and Conclusions of Law" presented for plaintiff Nelson were signed by the District Court and were filed. The document concluded thus—

"From the foregoing Findings of Fact the court concludes that judgment should be entered in favor of the plaintiff and against the defendant in the sum of Six Thousand ($6000.00) Dollars together with interest thereon at the legal rate of seven (7%) per annum from the date of the commencement of this action, to-wit: September 24, 1931, together with plaintiff's costs of suit incurred herein, and that upon satisfaction of said Judgment the Clerk of this court should deliver to the defendant the assignment by plaintiff against the San Francisco Iron & Metal Company, a corporation in bankruptcy.

"Let judgment be entered accordingly."

Sec. 875, Title 28, U. S. C. A., is in the margin;[1] also Rule 42, District Court Northern District of California.[2]

We are unable to accept the conclusion below that within the intent of the statute the "progress of the trial" ended on June 1,

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[1] Section 875, Title 28, U. S. C. A.

Review in cases tried without jury. When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section 773 of this title, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.

[2] Rule 42, United States District Court, Northern District of California.

Findings. . . . In actions at law, where a request for special findings of fact is made and granted, and in suits in equity, no judgment shall be entered until the findings and, in an equity suit, the conclusions of law, shall have been signed and filed or waived as hereinafter provided; but the rendition of the decision or opinion shall be deemed and considered; and shall be entered by the Clerk, as merely a preliminary order for judgment. Within five days after written notice of the decision, the prevailing party shall prepare a draft of the finding and, in an equity suit, of the conclusions of law, and deliver the same to the Clerk for the Judge and serve a copy thereof upon the adverse party, who may, within five days thereafter, deliver to the Clerk and serve upon the adverse party such proposed amendments or additions as he may desire.

If the prevailing party fails to present such draft as above provided, the adverse party may prepare a draft thereof and deliver the same to the Clerk

when the court ordered "that judgment be entered for plaintiff, with interest and costs, upon findings of fact and conclusions of law to be presented", and thereafter it was too late adequately to present special findings of fact. The qualifying words in the order "upon findings of fact and conclusions of law to be presented" are appropriate to suggest "merely a preliminary order" and reservation of opportunity for further action. Considering them along with Rule 42 and the subsequent action by counsel for both sides and the court—all without suggestion of objection—it appears plain enough that all parties understood the cause was "in progress of trial" until entry of the final judgment on June 16. Rule 42 is susceptible of the interpretation insisted upon by counsel for petitioner and apparently they proceeded in good faith according to that view. In so doing, we think they were right. See *Clement* v. *Phoenix Ins. Co.*, Fed. Cases 2,882.

Continental National Bank v. *National City Bank* does not discuss Rule 42 and went upon facts which seem materially different from those presented by this record.

Refusal to consider the eleven assignments of error arose from what we regard as wrongful interpretation and application of Sec. 875 and Rule 42. Their evident purpose is to insure orderly and timely presentation to the judge of matters deemed important in advance of any definite action by him in respect of them. They should not be so narrowly construed as to defeat their real purpose.

It is not necessary in the circumstances to treat the first order for judgment (June 1) as ending "the progress of the trial." All counsel and the presiding judge seem, rightly we think, to have entertained a wholly different view and to have acted accordingly.

The challenged judgment must be reversed. The cause will be remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

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for the Judge and serve a copy thereof on the prevailing party within five days thereafter.

The findings of fact and, where required, the conclusions of law, shall thereafter be settled by the Judge, and when so settled shall be engrossed within five days thereafter, and shall be then signed and filed. A failure to comply with the requirements of this rule may be deemed to be a waiver of findings by the party so failing.